

STATE OF MICHIGAN
COURT OF APPEALS

JOEL ROUDABUSH, DAVID ARMSTRONG,
DAVID HOPKINS, CURTIS LOOSENORT, and
STACY HONSON,

UNPUBLISHED
July 21, 2005

Plaintiffs-Appellants,

v

CHARLES E. LIPPERT and LIPPERT CEDAR
DEVELOPMENT COMPANY,

No. 253347
Kent Circuit Court
LC No. 02-007711-CB

Defendants-Appellees.

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In this partnership dispute, plaintiffs appeal as of right from the trial court's opinion and order granting defendants' motion for summary disposition under MCR 2.116(C)(10). Because we conclude that there exists a genuine issue of material fact regarding whether the partnership agreement at issue here was modified by an affirmative course of conduct, we reverse and remand.

I. Basic Facts and Procedural History

This matter arises from the termination of Lippert Cedar Development Company, a partnership formed by defendant Charles Lippert in 1984 for the limited purpose of developing and leasing a single commercial property for use as a retail pharmacy. At the time Lippert created the partnership he also owned and operated a chain of retail pharmacies, of which plaintiffs were each "key" employees. It is not disputed that to encourage plaintiffs to continue their employment with his pharmacies Lippert offered plaintiffs the opportunity to become "investing partners" in Lippert Cedar Development Company for a nominal capital contribution of \$100. Consistent with this purpose, § 7.02 of the partnership agreement later executed by the parties expressly provided that, upon termination of an investing partner's employment with Lippert's pharmacy chain, their interest in the partnership would terminate and they would be entitled only to a return of their capital contribution. The agreement further granted Lippert, as managing partner with a controlling interest, authority to make all decisions regarding partnership operations, and required that all modifications to the agreement be contained in a writing signed by all managing partners and an aggregate of those investing partners holding more than 66 2/3% of investing partner partnership interests.

Less than one month after executing the partnership agreement Lippert sold his pharmacies to a national retail pharmacy chain and, as a result, plaintiffs' employment with Lippert's pharmacies ended. Lippert, however, did not enforce the employment provisions of § 7.02 and, over the course of the next eighteen years, paid each plaintiff more than \$26,000 as their share of profits generated by the partnership. In March 2002, however, Lippert informed plaintiffs that he was invoking the employment provisions of § 7.02 and terminating both the partnership and plaintiffs' interests therein. Following the return by Lippert of plaintiffs' initial capital contributions, plaintiffs filed the instant suit alleging that, as a result of his longstanding conduct inconsistent with the termination provisions of § 7.02 of the partnership agreement, Lippert was without authority to invoke that section and was, therefore, required to liquidate and distribute the assets of the partnership among each partner.

Following a hearing on the parties' cross-motions for summary disposition, the trial court held that in the absence of a signed writing waiving or otherwise modifying the employment requirement of the partnership agreement, Lippert acted within the broad authority granted him under the terms of the partnership agreement and defendants were, therefore, entitled to summary disposition. On appeal, plaintiffs argue that because the terms of the parties' relationship were modified by Lippert's conduct inconsistent with the provisions of § 7.02, the trial court erred in granting summary disposition in favor of defendants.

II. Analysis

This Court reviews a trial court's ruling on a motion for summary disposition *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In granting summary disposition in favor of defendants, the trial court relied in large part on the absence of a signed writing waiving the employment requirement of § 7.02 or otherwise modifying the partnership agreement. However, in *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003), our Supreme Court considered the requirements for modifying an agreement protected by written modification or anti-waiver clauses and, in doing so, recognized that the freedom to contract allows parties to modify contracts notwithstanding such restrictive clauses. The Court stressed, however, that such modification requires a showing of mutual assent to the new or changed contract, as well as to forgo the restrictive clause in the original contract. *Id.* at 372-373. With respect to those situations where a course of conduct is the alleged basis for modification, the Court held that the requirement of mutual assent is satisfied "when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms." *Id.* at 374.¹

¹ As explained by the Court in *Quality Products*, *supra* at 373-374, unlike those circumstances involving an express oral or written agreement to modify an existing contract:

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Here, it is not disputed that, despite his knowing and clear right to do so, Lippert failed to invoke the employment provisions of the partnership agreement for more than eighteen years after plaintiffs' employment with his pharmacies ended. Although this failure is, in and of itself, insufficient to constitute the clear and convincing evidence of waiver required to modify the partnership agreement, plaintiffs presented additional evidence that, when viewed in a light most favorable to plaintiffs, suggests that this failure stemmed from a "voluntary and intentional abandonment" of the employment requirement of § 7.02, such that the provisions of that section were no longer intended to be a part of the original partnership agreement. See *id.* As noted above, during the eighteen-year period since termination of plaintiffs' employment, Lippert consistently distributed to plaintiffs a share of the profits generated by the partnership. Moreover, Lippert did so in a manner indicating an intent to continue plaintiffs' partnership interests despite the requirement of employment found in § 7.02. For example, in several of his letters accompanying partnership profit distributions to plaintiffs, Lippert remarked on the expected appreciation of the property owned by the partnership and the "benefit" each plaintiff, as a partner in Lippert Cedar Development Company, would realize upon the ultimate sale of the property. Lippert also, during each year in which a distribution was made, provided each plaintiff with a Schedule K-1 – a form generally used only to report to the Internal Revenue Service an individual's share of income, deductions, and credits derived from their interest in a partnership – and even requested and accepted the capital contribution of at least one plaintiff after the sale of his pharmacies and the resulting termination of that plaintiffs' employment. Although Lippert testified at deposition that his conduct in this regard stemmed not from any intentional waiver of the employment requirement of the partnership agreement, but rather his appreciation of plaintiffs' prior years of service, such testimony, in the face of the evidence cited above, merely serves to create a genuine issue of material fact regarding whether the partnership agreement was modified through an affirmative course of conduct by Lippert that establishes an intent to waive the employment and written modification requirements of that agreement.

Because such a question of fact precludes summary disposition in favor of either party, the trial court's grant of summary disposition in favor of defendants was error. *West, supra*. Consequently, we reverse and remand this matter for proceedings consistent with this opinion.

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in situations where a party relies on a course of conduct to establish modification, mutual assent is less clear and thus the rescission, or *waiver*, of the original contract's terms is not so evident. As a result, where course of conduct is the alleged basis for modification, a waiver analysis is necessary. [Footnote omitted.]

As in other contexts, waiver for purposes of contract modification through an affirmative course of conduct "is a voluntary and intentional abandonment of a known right." *Id.* at 374, citing *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64 n 4; 642 NW2d 663 (2002) and *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999).

We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly